BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VINCENT MACIAS
Claimant
VS.

GEC PRECISION CORPORATION
Respondent
AND

HOME INSURANCE COMPANY
Insurance Carrier

Docket No. 154,166

ORDER

ON the 22nd day of March, 1994, the claimant's application for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey dated January 21, 1994, came on before the Appeals Board for oral argument.

APPEARANCES

Claimant appeared by and through his attorney William M. Kehr, of Derby, Kansas. Respondent and insurance carrier appeared by and through their attorney Edward D. Heath, Jr., of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that specifically set forth in the Award of the Special Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are the same as specifically set forth in the Award of the Special Administrative Law Judge.

ISSUES

The Special Administrative Law Judge found claimant entitled to permanent partial general disability benefits based upon a twenty-five percent (25%) work disability. The claimant requested this review. The issues now before the Appeals Board are:

(1) Nature and extent of disability; and

(2) Whether written claim was timely made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds as follows:

(1) Claimant is entitled to permanent partial general disability benefits based upon a thirty-one percent (31%) work disability for injuries he sustained on August 1, 1989, while working for respondent.

On August 1, 1989, the claimant, Vincent Macias, was employed as a truck driver at GEC Precision Corporation. Mr. Macias was unloading a company truck when a skid broke and claimant fell approximately 12 feet. As a result of this accident, claimant fractured his right thumb and tore the medial meniscus in his left knee.

Bruce G. Ferris, M.D., treated claimant's thumb and believes that it may eventually require surgical reconstruction. Dr. Ferris believes that, based upon the American Medical Association's Guides to the Evaluation of Permanent Impairment, claimant has experienced a forty percent (40%) permanent impairment of function to the thumb as a result of this injury. According to Dr. Ferris, the situs of injury is the metacarpal trapezial joint of the right thumb. Dr. Ferris believes that due to the thumb injury claimant should restrict his lifting to 15 pounds with the right arm and perform no firm pinching motions with the thumb in the extended position. Dr. Ferris is a board certified plastic surgeon and holds a certificate for surgery of the hand.

The respondent had claimant examined by board certified orthopedic surgeon, J. Mark Melhorn, M.D. Dr. Melhorn found that claimant had sustained a strain of the metacarpal phalange of the right thumb and had developed arthritis in the carpometacarpal joint of the right thumb. Dr. Melhorn believes that claimant has a twenty and seven-tenths percent (20.7%) functional impairment to the right thumb pursuant to the AMA Guides.

Director's Rule 51-7-8 states that an injury to the metacarpals shall be considered an injury to the hand. As the medical evidence is uncontroverted that claimant has sustained injury to the metacarpals and joints of the thumb more proximally located to the wrist, then this injury is to be treated as an injury to the hand, not the thumb.

Claimant came under treatment for his left knee by board certified orthopedic surgeon, Duane A. Murphy, M.D. In the course of treatment, Dr. Murphy performed two arthroscopic procedures upon the knee and believes that claimant will require a total knee replacement within several years. Dr. Murphy believes that claimant has experienced a twenty percent (20%) permanent partial impairment of function to the lower extremity as a result of the knee injury.

Without benefit of viewing a surveillance video tape, Dr. Murphy testified that claimant was significantly restricted in his ability to walk without a limp and a cane. Believing claimant's condition was much worse than that represented on the surveillance video-tape, Dr. Murphy testified that claimant should limit himself to sedentary work and

reduce his standing, walking, squatting, and climbing to a minimum. The Appeals Board finds that claimant misled Dr. Murphy regarding his condition. At his regular hearing in March of 1993, claimant testified that he needed a cane to walk to keep his balance and that he did not believe that he could walk without it. Claimant also testified that the cane was required to climb his porch steps. However, the surveillance video tape introduced into evidence showing claimant on July 19, 1992, and May 19, 1993, indicates that claimant is able to walk without the assistance of the cane and able to negotiate steps without apparent problems. As found by the Special Administrative Law Judge, claimant is able to ascend steps in front of his home without hesitation and able to work on what appeared to be a sidewalk repair project while on his knee, bending over, squatting down and sitting. Also, the claimant was observed pushing a wheelbarrow downhill without apparent difficulty.

Based upon the above, the Appeals Board agrees with the finding of the Special Administrative Law Judge that claimant has displayed that he is able to work in the light category of labor. The Appeals Board feels the opinion of Dr. Murphy is in line with its conclusion as the doctor did state in his deposition that if claimant's activities outside his office were different than those that claimant had presented, then his opinion with regard to restrictions and limitations would be affected.

Claimant and respondent both presented labor market experts. The Appeals Board finds the testimony of respondent's vocational rehabilitation expert, Karen Crist Terrill, to be more credible. Should claimant be capable of performing light work, Ms. Terrill believes that there has been a thirty-one percent (31%) loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage in the range of twenty-nine to thirty-four percent (29-34%).

The testimony of claimant's labor market expert, Jerry D. Hardin, is not accepted in this circumstance as the Appeals Board finds that Mr. Hardin based his conclusions upon the restrictions of Dr. Murphy which we have found to be based upon false information and representations. As Mr. Hardin's opinion is based upon false assumptions, we are unable to consider it for purposes of this award.

K.S.A. 1992 Supp. 44-510e(a) requires a balancing of one's ability to perform work in the open labor market and ability to earn comparable wages. This statute is silent as to how the factors are to be weighed.

In Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990), the Court held permanent partial general disability is determined by the extent (percentage) of the reductions of an employee's ability to perform work in the open labor market and the employee's ability to earn comparable wages. The Court in Hughes held that both must be considered in light of the employee's education, training, experience, and capacity for rehabilitation.

In the case at hand the Appeals Board, as indicated above, finds that both of the claimant's ability to perform work in the open labor market and the ability to earn comparable wages has been reduced by thirty-one percent (31%) as a result of the accidental injury of August 1989. Therefore, the Appeals Board finds that claimant is entitled to receive permanent partial general disability benefits based upon a thirty-one percent (31%) work disability.

Respondent argues that claimant should receive benefits based upon two scheduled injuries rather than for injury to the body as a whole. Respondent cites no authority for that

proposition. The Appeals Board finds that claimant has sustained injury to two (2) separate extremities and is therefore entitled to receive benefits under K.S.A. 1992 Supp. 44-510e for a nonscheduled injury.

Where disability exists in both eyes, both hands, both arms, both feet, both legs, or of any combination thereof, the disability is treated as a nonscheduled injury, and compensation is payable either for permanent partial or permanent total as the evidence would indicate.

The statutory language of K.S.A. 44-510e does not specify that partial disability to those areas removes the injuries from the schedule, but the Kansas Supreme Court so held in Honn v. Elliott, 132 Kan. 454, 295 Pac. 719 (1931). Also see Murphy v. IPB, Inc., 240 Kan. 141, 727 P.2d 468 (1986) and Downes v. IBP, Inc., 10 Kan. App. 2d 39, 691 P.2d 42 (1984).

In Honn v. Elliott, supra, the Kansas Supreme Court based its rationale on the statute dealing with permanent total disability, the predecessors to K.S.A. 44-510c. The Court reasoned that if the loss of both eyes, hands, arms, feet, or legs entitled an injured worker to permanent total benefits, the partial loss of those body parts should entitle the worker to receive permanent partial general disability benefits for a nonscheduled injury. After Honn, the Legislature modified the permanent total statute, K.S.A. 44-510c, to provide permanent total benefits when the combined loss relates to the upper and lower extremities.

K.S.A. 1992 Supp. 44-510c(a)(2) provides:

> "Permanent total disability exists when the employee, on account of injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, shall, in the absence of proof to the contrary, constitute permanent total disability." (Emphasis added.)

The case at hand is to be distinguished from Wammack v. Root Manufacturing Co., 184 Kan. 367, 336 P.2d 411 (1959), as Wammack dealt with injury to both thumbs and the Court held the injured worker was entitled to two scheduled injuries. The Court reasoned that the loss of two thumbs did not entitle the injured worker to permanent total disability benefits and, therefore, the partial loss of use of the thumbs did not entitle the worker to permanent partial general disability benefits for a nonscheduled injury. Whereas, for the reasons stated above, the case at bar involves the hand, not the thumb. We find the combination of injury to the hand and knee to fall within the combination contemplated by K.S.A. 44-510c.

(2) The respondent and insurance carrier contend that claimant failed to make timely written claim for benefits. The Appeals Board does not agree.

The evidence is uncontroverted that claimant began treatment with Dr. Murphy for his work related injuries in August 1989. Dr. Murphy scheduled arthroscopic surgery for claimant's knee as early as November 1989, and again in April 1990, both of which were postponed due to other health reasons. The Appeals Board finds that claimant's treatment with Dr. Murphy did not cease during the periods in question, but that treatment was postponed until such time as claimant was able to rectify problems with his blood pressure and kidneys. February 1991 was the first date that respondent or insurance carrier

attempted to withdraw the authorization of Dr. Murphy to treat the claimant. Therefore, claimant's written claim for compensation served on February 21, 1991, is timely.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated January 21, 1994, is modified in the respect that claimant is entitled permanent partial general disability benefits based upon a thirty-one percent (31%) work disability.

An award of compensation is herein entered in accordance with the above findings of the claimant, Vincent Macias, and against the respondent, GEC Precision Corporation, and its insurance carrier, Home Insurance Company, for an accidental injury sustained on August 1, 1989, and based on an average weekly wage of $638.07, for 73.57 weeks of temporary total disability compensation at the rate of $271.00 per week in the sum of $19,937.47 and 341.43 weeks of compensation at the rate of $131.87 for a thirty-one percent (31%) permanent partial general disability in the sum of $45,024.37 making a total award of $64,961.84.

As of January 21, 1994, there is due and owing claimant $19,937.84 in temporary total compensation and 160 weeks of permanent partial compensation at the rate of $131.87 per week in the sum of $21,099.20 making a total due and owing of $41,037.04.

The remaining compensation is to be paid at the rate of $131.87 per week until fully paid or until further order of the Director.

All other orders of Special Administrative Law Judge William F. Morrissey not inconsistent with those addressed herein are hereby adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of June, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: William M. Kehr, PO Box 252, Derby, Kansas 67037

Edward D. Heath, Jr., PO Box 95, Wichita, Kansas 67201-0095
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director